review the request for a new determination. The RA may request a signed statement from the local office in support of the employer's assertion of U.S. worker nonavailability or referred U.S. workers not being able, willing, or qualified because of lawful job-related reasons.

(ii) *New determination.* If the RA determines that the employer's assertion of nonavailability is accurate and that no able, willing, or qualified U.S. worker has been refused or is being refused employment for other than lawful job-related reasons, the RA shall, within 72 hours after receipt of the employer's request, render a new determination. Prior to making a new determination, the RA promptly shall ascertain (which may be through the ES System or other sources of information on U.S. worker availability) whether able, willing, and qualified replacement U.S. workers are available or can be reasonably expected to be present at the employer's establishment within 72 hours from the date the employer's request was received.

(iii) *Notification of new determination.* If the RA cannot identify sufficient able, willing, and qualified U.S. workers who are or who are likely to be available, the RA shall grant the employer's new determination request (in whole or in part) based on available information as to replacement U.S. worker availability. The RA's notification to the employer on the new determination shall be in writing (by means normally assuring next-day delivery), and the RA's determination under the provisions of this paragraph (h)(3) shall be the final decision of the Secretary, and no further review shall be given to an employer's request for a new H–2A determination by any DOL official. However, this does not preclude an employer from submitting subsequent requests for new determinations, if warranted, based on subsequent facts concerning purported nonavailability of U.S. workers or referred workers not being eligible workers or not able, willing, or qualified because of lawful job-related reasons.

[52 FR 20507, June 1, 1987, as amended at 55 FR 29358, July 19, 1990; 64 FR 34966, June 29, 1999]

EFFECTIVE DATE NOTE: At 65 FR 43543, July 13, 2000, § 655.106 was amended in paragraph (a) by removing the phrase ''for temporary alien agricultural labor certification''; in paragraph (b)(1) by removing from the first sentence the phrase ''20 calendar days'' and adding the phrase ''30 calendar days'' in lieu thereof; in paragraph (c)introductory text, by removing from the paragraph heading the phrase ''temporary alien agricultural labor certifications'', and adding in lieu thereof the word ''applications''; in paragraph (c)(1) by removing from the first sentence the phrase ''Temporary alien agricultural labor certifications are'' and adding in lieu thereof the phrase ''The application is''; and by removing from the third sentence the phrase ''certification shall be'' and adding in lieu thereof the phrase ''certifications and H–2A petitions shall be''; in paragraph (c)(2)(i) by removing from the first sentence the phrase ''certification as a joint employer'' and adding in lieu thereof the phrase ''certification and H–2A petition as a joint employer'' and by removing the phrase ''the temporary alien agricultural labor certification granted'' and adding in lieu thereof the phrase ''the temporary labor certification and petition granted''; by removing from the second sentence the phrase ''certification was'' and adding in lieu thereof the phrase ''certification and H–2A petition were''; by removing from the third sentence the phrase ''certifications to associations'' and adding in lieu thereof the phrase ''certifications and H–2A petitions to associations'; and by removing from the fourth sentence the phrase ''certification as a sole employer'' and adding in lieu thereof the phrase ''certification and H–2A petition as a sole employer''; in paragraph (d) by removing from the first sentence the phrase ''certification (in whole or in part)'' and adding in lieu thereof the phrase ''certification and H–2A petition (in whole or in part)''; in paragraph (e)(1) by removing the phrase ''a temporary agricultural labor certification'' and adding in lieu thereof the phrase ''an application''; in paragraph (h) by removing from the first sentence the phrase ''20 calendar days'' and adding in lieu thereof the phrase ''30 calendar days'', effective Nov. 13, 2000. At 65 FR 67628, Nov. 13, 2000, the effective date was delayed until Oct. 1, 2001. The effective date was further delayed until Sept. 27, 2002 at 66 FR 49275, Sept. 27, 2001.

§ 655.107 Adverse effect wage rates (AEWRs).

(a) *Computation and publication of AEWRs.* Except as otherwise provided in this section, the AEWRs for all agricultural employment (except for those occupations deemed inappropriate under the special circumstances provisions of § 655.93 of this part) for which

temporary alien agricultural labor certification is being sought shall be equal to the annual weighted average hourly wage rate for field and livestock workers (combined) for the region as published annually by the U.S. Department of Agriculture (USDA) based on the USDA quarterly wage survey. The Director shall publish, at least once in each calendar year, on a date or dates to be determined by the Director, AEWRs for each State (for which USDA publishes regional data), calculated pursuant to this paragraph (a) as a notice or notices in the FEDERAL REGISTER.

(b) *Higher prevailing wage rates.* If, as the result of a State agency prevailing wage survey determination, the prevailing wage rate in an area and agricultural activity (as determined by the State agency survey and verified by the Director) is found to be higher that the AEWR computed pursuant to paragraph (a) of this section, the higher prevailing wage rate shall be offered and paid to all workers by employers seeking temporary alien agricultural labor certification for that agricultural activity and area.

(c) *Federal minimum wage rate.* In no event shall an AEWR computed pursuant to this section be lower than the hourly wage rate published in 29 U.S.C. 206(a)(1) and currently in effect.

[52 FR 20507, June 1, 1987, as amended at 54 FR 28046, July 5, 1989]

§ 655.108 H–2A applications involving fraud or willful misrepresentation.

(a) *Referral for investigation.* If possible fraud or willful misrepresentation involving a temporary alien agricultural labor certification application is discovered prior to a final temporary alien agricultural labor certification determination or if it is learned that the employer or agent (with respect to an application) is the subject of a criminal indictment or information filed in a court, the RA shall refer the matter to the INS and DOL Office of the Inspector General for investigation. The RA shall continue to process the application and may issue a temporary alien agricultural labor certification.

(b) *Continued processing.* If a court finds an employer or agent not guilty of fraud or willful misrepresentation, or if the Department of Justice decides not to prosecute an employer or agent, the RA shall not deny the temporary alien agricultural labor certification application on the grounds of fraud or willful misrepresentation. The application, of course, may be denied for other reasons pursuant to this subpart.

(c) *Terminated processing.* If a court or the INS determines that there was fraud or willful misrepresentation involving a temporary alien agricultural labor certification application, the application is thereafter invalid, consideration of the application shall be terminated and the RA shall return the application to the employer or agent with the reasons therefor stated in writing.

EFFECTIVE DATE NOTE: At 65 FR 43544, July 13, 2000, § 655.108 was amended in paragraph (a) by removing from the first sentence the phrase ''temporary alien agricultural labor certification'' and adding in lieu thereof the phrase ''an application''; and by removing from the second sentence the word ''certification'' and adding in lieu thereof the phrase ''certification and the determination on the H–2A petition cannot be made until the investigation has been completed', effective Nov. 13, 2000. At 65 FR 67628, Nov. 13, 2000, the effective date was delayed until Oct. 1, 2001. The effective date was further delayed until Sept. 27, 2002 at 66 FR 49275, Sept. 27, 2001.

§ 655.110 Employer penalties for noncompliance with terms and conditions of temporary alien agricultural labor certifications.

(a) *Investigation of violations.* If, during the period of two years after a temporary alien agricultural labor certification has been granted (in whole or in part), the RA has reason to believe that an employer violated a material term or condition of the temporary alien agricultural labor certification, the RA shall, except as provided in paragraph (b) of this section, investigate the matter. If, after the investigation, the RA determines that a substantial violation has occurred, the RA, after consultation with the Director, shall notify the employer that a temporary alien agricultural certification request will not be granted for the next period of time in a calendar year during which the employer would